UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/574
12 November 1992
ENGLISH

ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 574

Case No. 630: MEGZARI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Mikuin Leliel Balanda;

Whereas, on 8 November 1991, Abdelaziz Megzari, a staff member of the United Nations Conference on Trade and Development, hereinafter called UNCTAD, filed an application containing the following pleas:

"II. PLEAS

The Applicant respectfully requests the Tribunal:

(i) To declare illegal the Administration's decision not to promote him to the D-1 level, the grade which, in accordance with the norms governing the organization of the Secretariat (...), was appropriate for the post of Chief of Branch.

(ii) To find that the Administration committed serious errors of fact and law and failed to observe the provisions of the Staff Regulations and Rules.

(iii) To find that the Appointment and Promotion Board did not respect due process and the principles of equity and did not in good faith make an appropriate recommendation taking the Applicant's rights duly into account, which, in fact and in law, amounted to a failure on the part of the Board to submit a recommendation as it was required to do. The Applicant's memorandum drawing attention to important irregularities committed by the Administration and the other documents in his file constituting the basic documentation submitted to the Appointment and Promotion Board should

inevitably have led the Board to recommend his promotion. Any reasonable and impartial appointment and promotion body, duly constituted and acting without prejudice and in accordance with law, justice and equity in the proper exercise of its functions, could not have acted otherwise.

(iv) To rule that the Joint Appeals Board [JAB] did not consider or take into account, as it should have done, memoranda addressed to it by the Applicant on the subject of irregularities committed in an attempt to tamper with his file and that the procedure was accordingly flawed and incomplete.

(v) To find that the Joint Appeals Board committed both substantive and procedural irregularities: substantive, in that it disregarded norms adopted by the United Nations for the organization of the Secretariat; procedural, in that it based its considerations, conclusions and additional remarks on an irrelevant document which had not been introduced into the file, either by the Applicant or by the Respondent, and which the JAB had not submitted to the Applicant for comment.

(vi) To overturn the Secretary-General's decision not to promote the Applicant, to order the application of the norms governing the organization of the Secretariat and all other relevant statutory and regulatory provisions and, in consequence, to order the granting of the D-1 level to the Applicant retroactively, with effect from his assignment to the post of Chief of Branch on 1 July 1985.

(vii) To decide that compensation be paid to the Applicant for loss of income resulting from the delay in promotion and for the suffering and damage to his morale caused by the extremely difficult ordeal that he has been forced to endure in his professional life. The Applicant considers that the circumstances justify payment of a sum equal to ten months of his current net base salary as compensation for the injury sustained.

(viii) To grant him such other relief as may be deemed appropriate."

Whereas, on 26 May 1992, the Respondent filed his answer;

Whereas, on 18 June 1992, the Applicant filed his written observations, in which he modified his pleas as follows:

"Pleas

19. The Applicant considers that the additional time of five and a half months requested by the Respondent to prepare his

answer has caused him injury. He respectfully requests the Tribunal to grant him additional compensation for this injury in the amount of one month of his current base salary.

20. The Applicant further requests the Tribunal to order the Respondent:

(i) To produce the memorandum, dated 8 July 1991, from the Secretary of the Joint Appeals Board addressed to Mr. Busuttil relating to the Applicant's case, which was not brought to the attention of the Applicant, and any other correspondence between the Administration and the Joint Appeals Board relating to the Applicant's case which was not communicated to the Applicant.

(ii) To inform the Tribunal how the Joint Appeals Board obtained a copy of the memorandum from the Deputy to the Secretary-General [of UNCTAD] dated 21 February 1991, to which it refers in paragraph 52 of its report to the Secretary-General, dated 25 July 1991 (...), which memorandum was not yet in the Applicant's official status file on 18 September 1991 (...).

(iii) To provide the minutes of the deliberations of the Appointment and Promotion Board relating to the recourse filed by the Applicant and Mr. Chandra Patel respectively, seeking inclusion in the D-1 promotion register for 1986 or, failing that, an explanation of the reasons why the Board rejected the Applicant's recourse while it found in favour of Mr. Patel's recourse who had also not been recommended by UNCTAD for promotion. He had occupied a P-5 post in 1986 as 'Senior Economic Affairs Officer' and did not have any supervisory functions (thus ranking beneath the Applicant in the hierarchical order), and who moreover, had less seniority at the P-5 level and fewer years of service with the Organization than the Applicant and who was proficient in fewer languages than the Applicant. The fact that Mr. Patel occupied the post of chief of the UNCTAD Liaison Office in New York in 1987 when the Appointment and Promotion Board considered his recourse cannot, obviously, explain the favourable action on his recourse, in so far as the issue was the promotion register for the preceding year and the post he occupied in New York in 1987 was graded at the P-5 level (...).

(iv) To produce the minutes of the deliberations of the Appointment and Promotion Board relating to the recourse filed by the Applicant and Mr. Kuang-Hua Khaw respectively, seeking their inclusion in the D-1 promotion register for 1987 or, failing that, an explanation why the Board rejected the Applicant's

recourse while it found in favour of Mr. Khaw's recourse when the latter had also not been recommended by UNCTAD for promotion to a post not yet classified at the D-1 level in 1988, let alone in 1987, on the ground that in 1987 he occupied the post of Chief of Unit supervising only one Professional staff member (hence he ranked beneath the Applicant in the hierarchical order) and who moreover, had the same seniority at the P-5 level as the Applicant and fewer years of service with the Organization, less mobility and proficiency in fewer languages than the Applicant. It should be emphasized, in this connection, that the memorandum from Mr. Berthelot of 11 July 1988 recognized that:

> 'With respect to Mr. Khaw and Mr. Scott, it was noted that their functions and organizational location made it feasible to request classification at the D-1 level and accordingly, priority should be given to submitting their job descriptions to Headquarters for classification.'"

Whereas, on 23 October 1992, the Tribunal addressed a number of questions to the Respondent, to which he provided answers on 26 October 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 26 May 1967. He was initially offered a fixed-term appointment at the P-1 level as an Assistant Economic Affairs Officer with the United Nations Economic and Social Office in Beirut (the predecessor of the Economic and Social Commission for Western Asia). On 26 July 1969, he was granted a probationary appointment and, on 1 May 1970, a permanent appointment. On 1 June 1970, he was promoted to the P-2 level as Associate Economic Affairs Officer. On 1 September 1970, the Applicant was transferred to UNCTAD in Geneva. He was then successively promoted to the P-3 level, with effect from 1 April 1973, to the P-4 level as Economic Affairs Officer, with effect from 1 April 1976, and to the P-5 level, as Senior Economic Affairs Officer, with effect from 1 April 1981.

In a memorandum dated 11 June 1985, the Deputy Secretary-General of UNCTAD announced to all UNCTAD staff a series of administrative measures involving the reassignment, with effect from 1 July 1985, of 39 staff members in the Professional and Director categories, within the UNCTAD Secretariat. The Applicant was among those staff members reassigned to other duties. He was given the functions of Chief, Non-ICA Commodities Branch. This decision was communicated to him in a memorandum, dated 11 June 1985, from the Chief, Administrative Service, UNCTAD. The Applicant's functional title was changed from "Senior Economic Affairs Officer" to "Chief of Branch".

On 17 June 1987, the Assistant Secretary-General for Human Resources Management announced to the staff, in information circular ST/IC/87/34, the 1986 Principal Officer (D-1) Promotion Register. The Applicant's name was not included. On 19 July 1987, the Applicant instituted a recourse procedure before the Appointment and Promotion Board (APB) requesting the inclusion of his name in the 1986 D-1 Promotion Register. The recourse was unsuccessful.

In 1988, the Secretary-General of UNCTAD reorganized the UNCTAD secretariat.

In a memorandum dated 30 June 1988, the Officer-in-Charge of the Commodities Division announced to all staff members of the Division the new structure of the Division "as approved by the Secretary-General [of UNCTAD]". Three branches that had hitherto existed in the Commodities Division, including the Non-ICA Commodities Branch, which was headed by the Applicant, were replaced by sections and the former branch chiefs were reassigned to the Division Director's office. A chart illustrating the new structure of the Commodities Division was attached to the memorandum, showing inter alia the Applicant's assignment as "Senior Adviser on the Common Fund". A footnote to the chart states: "Mr. Megzari has been temporarily assigned as a Senior Adviser on the Common Fund. Upon the termination of this assignment he will resume his regular duties within the [UNCTAD] Secretariat."

On 24 May 1989, the Assistant Secretary-General for Human Resources Management announced to the staff, in information circular ST/IC/89/36, the 1987 D-1 Promotion Register. The Applicant's name was not included.

On 21 July 1989, the Applicant's temporary assignment as Senior Adviser on the Common Fund came to an end. The Common Fund was established as an autonomous organization in Amsterdam and its Managing Director was appointed. Accordingly, on 24 July 1989, the Applicant wrote to the Secretary-General of UNCTAD and, recalling the temporary nature of his assignment and the understanding that upon its termination he would "resume regular duties within the [UNCTAD] Secretariat", asked the Secretary-General to "give the necessary instructions" so that he could resume his "regular duties as soon as possible".

On 21 August 1989, the Applicant instituted a recourse procedure before the APB against the non-inclusion of his name in the 1987 D-1 Promotion Register, but the recourse was unsuccessful.

On 5 September 1989, the UNCTAD Administration issued a Personnel Action (P.5 form) to change the Applicant's title retroactively to "Senior Adviser [Common Fund]" with effect from 1 July 1988. Upon receipt of this communication, on 20 September 1989, the Applicant asked the UNCTAD Administration for an explanation concerning the timeliness of the document and the lack of a reply to his request of 24 July 1989. In a reply dated 3 November 1989, the Director, Programme Support and Management Services, confirmed to the Applicant that "[his] assignment as Senior Adviser (Common Fund) was of a strictly temporary nature, which was in no way to affect [his] status or future career prospects" and that accordingly, the P.5 action form in question had been "withdrawn" from the Applicant's personnel files in Geneva and at Headquarters in New York. With regard to the Applicant's future assignment "corresponding to [his] status", the Director, Programme Support and Management Services, stated that he hoped consultations thereon would be completed soon.

On 11 January 1990, the Applicant requested the Secretary-General to review the administrative decision not to include his name in the 1987 D-1 Promotion Register. In a reply dated 5 February 1990, the Chief of the Administrative Review Unit stated: "Although the Secretary-General reserves the right to raise at a later stage the issue of receivability under the Staff Rules, the review you request will be conducted." In a letter dated 6 April 1990, the Director, Staff Administration and Training Division, OHRM, informed the Applicant that there were no grounds on which his non-inclusion in the 1987 D-1 Promotion Register could be altered.

On 10 April 1990, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB). The Board adopted its report on 25 July 1991. Its conclusions, recommendation and additional remarks read as follows:

"Conclusions and recommendation

53. In view of the foregoing, the Panel unanimously

(a) finds that the appeal is receivable both ratione temporis and ratione materiae and is, therefore, properly before the JAB;

(b) concludes that the Appellant had no legal expectancy of promotion to the D-1 level during the 1987 promotion exercise and that his statutory right to consideration was honoured;

(c) further concludes that the decision not to include his name in the 1987 D-1 Promotion Register was not based on error of facts and that the Appellant was unable to sustain the burden of proof that the contested decision was vitiated by prejudice or other extraneous factors.

54. Accordingly, the Panel makes no recommendation in support of the appeal.

Additional remarks

55. As noted in paragraph 52, supra, the Appellant has been appointed, effective 25 February 1991, as Chief of Minerals and Metals Branch, a post with inherent duties and responsibilities presumably at the D-1 level.

> 56. This development indicates to the Panel that the Administration of UNCTAD fulfilled its commitment to assign the Appellant to a post corresponding to his status (...). This assignment constitutes a prima-facie recognition of the Appellant's suitability to the position of Chief of Branch.
>
> 57. The Panel, therefore, notes with appreciation that the Administration of UNCTAD has tangibly shown its goodwill by regularizing the Appellant's administrative situation, following the completion of his temporary assignment as Senior Adviser on the Common Fund.
>
> 58. While cognizant of the latitude of the Secretary-General's discretionary authority on promotion matters, the Panel wishes to express its trust that, now that the Appellant has been re-assigned to the post of Chief of Branch, the Administration of UNCTAD will give every possible consideration in reviewing his case for promotion to the commensurate level of his functions at the earliest opportunity and in accordance with the existing rules and procedures regulating the promotion process."

On 12 August 1991, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has re-examined your case in the light of the Board's report and has decided, in accordance with the Board's unanimous recommendation, to maintain the contested decision. The additional remarks made by the Board have been noted and will be brought to the attention of the UNCTAD Administration."

On 8 November 1991, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Applicant had an automatic right to promotion to the D-1 level, since his administrative status and title was that of "Chief of Branch", which corresponded to the grade D-1 according to the "norms established by the Secretary-General for organizational nomenclature".

2. The Respondent violated the Applicant's acquired right of priority to be promoted to the D-1 level as of 1 July 1985, when

other staff members not having the same right were appointed or transferred to UNCTAD at the D-1 level.

3. The decision not to promote the Applicant to the D-1 level was vitiated by erroneous information and irregularities.

Whereas the Respondent's principal contentions are:

1. Staff members have no acquired right to promotion, which is a matter entirely within the discretion of the Secretary-General.

2. The Applicant received due consideration for promotion in the 1987 promotion exercise and the decision not to include his name in the 1987 D-1 Promotion Register was not based on erroneous information or tainted by irregularities.

The Tribunal, having deliberated from 22 October to 12 November 1992, now pronounces the following judgement:

I. The Applicant's main plea is that the Tribunal should declare illegal and hence null and void the Administration's decision not to grant him a D-1 retroactively, effective 1 July 1985, during the 1987 promotion review. The Applicant contends that, in accordance with the norms applied by the Secretariat, that level was commensurate with the post of Chief of Branch which he held since 1 July 1985. The Applicant considers the contested decision to be tainted by procedural and substantive irregularities.

Consequently, as a result of the various injuries which the Applicant claims to have sustained, he seeks the payment of compensation by the Administration and further demands that certain documents dealing with the consideration of his case and that of other candidates by the Appointment and Promotion Board and the Joint Appeals Board, be made available to the Tribunal.

II. The Respondent contends, on the other hand, that staff members do not have an acquired right to promotion. Decisions regarding promotion are entirely within the discretion of the

Secretary-General. Furthermore, the Applicant's candidacy received due consideration during the 1987 promotion review. The decision not to include the Applicant's name in the 1987 D-1 Promotion Register was not based on any erroneous information or tainted by irregularities.

III. Having considered the unanimous recommendation of the Joint Appeals Board, the Tribunal holds that only compelling considerations of law or fact would provide sufficient cause for calling this recommendation into question. Such considerations do not exist in the present case.

The Tribunal is unable to accept the Applicant's claim that he had an acquired or automatic right to be promoted. As the Tribunal has consistently maintained in its case law, the Staff Regulations and Rules recognize the Secretary-General's discretionary powers in this area. (See Judgements No. 312, Roberts (para. II), and No. 134, Fürst (para. III).) Referring, in particular, to its Judgement No. 388, Moser (1987), the Tribunal holds that:

> "the classification of a particular post is altogether different from the promotion of its incumbent. The classification of each post depends on the nature of the duties and responsibilities assigned to it and not on the personal qualifications, experience or performance of the incumbent. Therefore, posts should be classified according to their respective job descriptions, which must be presumed to set forth accurately the nature of the duties and responsibilities of the job. Classification refers to the task to be performed by the incumbent of a given post; promotion is, in principle, connected to the way that task is performed, and takes into consideration performance evaluation reports".

Accordingly, the Applicant's claim cannot be sustained.

IV. The Tribunal considers that it had adequate information at its disposal and that the submission of the additional documents requested by the Applicant is unnecessary.

V. The Tribunal notes that the Applicant's case was considered in a non-discriminatory manner and in accordance with the relevant provisions of the Staff Regulations and Rules. The decision not to include the Applicant's name in the 1987 D-1 Promotion Register was not motivated by extraneous considerations. (See Judgements No. 312, Roberts (paras. VI and VII), No. 494, Rezene (para. XIX), and No. 561, Edussuriya (para. III)). Consequently, since the Applicant has not sustained any injury, there are no grounds for awarding compensation.

VI. Furthermore, the Tribunal was informed in response to questions addressed to the Respondent during the proceedings that, on 25 February 1991, the Applicant had been appointed Chief of the Minerals and Metals Branch, a post graded at the P-5 level. In addition, in the 1992 promotion review, the Applicant was recommended for the promotion to the D-1 level which he has been seeking.

VII. For the foregoing reasons the Tribunal rejects the application.

(Signatures)

Samar SEN
Vice President, presiding

Hubert THIERRY
Member

Mikuin Leliel BALANDA
Member

New York, 12 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary